(1)

95-1620

Supreme Court, U.S.
FILED
APR 9 1996
CLERK

No.

In The
Supreme Court of the United States

October Term, 1995

JAMES E. SHRADER,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,
RALPH A. WALKER,
HUGH A. WELLS;
JOHN B. LEWIS, JR.;
and JOHN DOE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS

1. (a) Is fabricating evidence and placing it within the record under review by a court within the definition of a judge's "judicial duties"? (b) Is an act that constitutes a crime defined by 18 U.S.C. §§ 241, 242 within the definition of a "judicial duty"?
2. Can the United States District Court summarily grant a Rule 12(b)(6) dismissal after denying the plaintiff a hearing afforded by Rule 12(d) of the Federal Rules of Civil Procedure in which evidence would be presented to defeat the assertions and claims made in the defendants' Rule 12(b)(6) motion to dismiss?
3. Does the Eastern District of North Carolina "Local Rule" 4.09, which stipulates that the judge may order a hearing on a motion or decide the motion without hearings, supersede the Fed.R.Civ.P. Rule 12(d), which mandates either holding hearings or deferring the resolution of Rule 12(b) asserted defenses until trial?
4. Is the state of North Carolina liable under 42 U.S.C. §§1983, 1985 in as much as the alleged conspiracy to deny equal protection of law may involve so many more state officials than the named defendants [i.e., John Doe(s)], that it would be accurate and proper for a jury to find that the denial of plaintiff's Constitutional Fifth and Fourteenth Amendment rights to due process and equal protection of law was in fact a policy and practice of the State irregardless of the State's statutes?
5. Whereas the suit asserts that the named defendants action of fabricating false evidence and stipulating it was within the arbitration record under their review was inherently beyond their jurisdiction and thus not due any judicial immunity and not a direct suit against the state, but both the named defendants and the State so far have asserted that all acts alleged in the complaint were 'official state' acts, and therefor does this not effectively make the suit one of official-capacity in which the State is therefor mandatorily joined.?
6. Can the State of North Carolina be excused from the suit by it's mere assertion in a memorandum supporting the motion to

dismiss that the ancient doctrine of 'sovereign immunity' applies when in fact the State specifically waived sovereign immunity when it granted the Congress the authority to enact laws to enforce the Fourteenth Amendment guarantee of equal protection of law to ALL persons and the suit invokes that provision of federal law?

7. Can the State of North Carolina conspire with it's officials to deprive a person of constitutional guarantees to equal protection of law and then be permitted to invoke 'sovereign immunity' to excuse itself from a suit?

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Stump v. Sparkman	435 U.S. 349 (1977)	p. 3 [footnote]
Tahir Erk v. Glenn L. Martin Co.	116 F2d 865 (CA4, 1941)	p. 3 [footnote]
United States v. New Wrinkle, Inc.	342 U.S. 371 (1951)	p. 3 [footnote]
Walker Process Equipment, Inc., v. Food Machinery & Chemical Co.	382 U.S. 172 (1965)	p. 3 [footnote]

JURISDICTION

1. Order and Judgment of the Fourth Circuit Court of Appeals dated November 27, 1995
2. Denial of Rehearing by the Fourth Circuit Court of Appeals dated January 12, 1996
3. 28 U.S.C. § 1254
4. 42 U.S.C. §§ 1983, 1985

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the United States Constitution

Criminal actions - Provisions Concerning - Due process of law and just compensation clauses.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use , without just compensation. (emphasis added)

Fourteenth Amendment to the United States Constitution.

Section 1. Citizens of the United States.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. Power to enforce amendment.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. 241 Conspiracy against rights of citizens
If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . . They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; . . .

42 U.S.C. §1983 Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. §1985 Conspiracy to interfere with civil rights

(1) . . .

(2) Obstructing justice; intimidating party, witness, or juror. If . . . or if two or more persons conspire for the purpose of impeding, obstructing, or defeating, in any manner, the due course of justice in any state or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Constitution of North Carolina, Article I, Sec 18, Courts shall be open.

All Courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Rule 12(d) of the Federal Rules of Civil Procedure stipulates:

"(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

STATEMENT OF THE CASE

Petitioner had a securities account with the Pinnacle Group ("Pinnacle") in which unauthorized index option trading by stockbroker Lee S. Folger ("Folger") had caused over a $300,000 loss. Petitioner was required to arbitrate[1] the issues in his attempt to recover those losses. Folger presented a single audio tape of excerpts from other personally made and unauthenticated audio tapes as his sole evidence that he had performed only authorized trades. The arbitrators refused petitioner's demands for the original audio tapes so that a tape expert could demonstrate that the trading instructions on the tape were not truthful, but altered in a cut and paste fashion to support Folger, and granted Pinnacle's counterclaim for debits that remained in the account. Petitioner subsequently filed an appeal in the North Carolina Court of Appeals based on the arbitrators having been inherently unfair to deny him the opportunity to present evidence[2] which could impeach the audio tape that Folger and Pinnacle exclusively relied upon to document and corroborate Folger's version of trading instruction conversations.

The actionable wrong that brings the defendant State Appeals Court judges, Ralph A. Walker, Hugh A. Wells, and John B. Lewis, Jr., under the jurisdiction of the federal courts arose when these defendants fabricated evidence and placed it within Petitioner's arbitration record that was before the court for review on appeal. That incredible act of falsifying the record which they were to review as judges amounts to conspiracy[3] to deny due process, fraud, malfeasance, abuse of office and denial of the constitutional right to due process of law under color of state law!

The defendants then performed their duties as judges of the North Carolina Court of Appeals and made a ruling based upon what they found in the record then before them. Defendants' opinion stipulated

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1 By stipulation of the securities contract with the brokerage firm.
2 G.S.N.C. §1-567.12(c)
3 42 U.S.C. §§1983, 1985; 18 U.S.C. §241

that the arbitration should indeed be overturned if the sole evidence in the arbitration was the broker's tapes[4], but stipulated they found other documentary evidence[5] presented by both sides to corroborate the disputed taped conversations which fulfilled the requirement of a fair hearing and they affirmed the arbitration. Petitioner timely filed a petition for a rehearing with the court which pointed out the absence of any other documentary evidence having been in the original arbitration record, but it was summarily denied, confirming the intent of the defendants was to base their decision on factual findings they themselves had "planted" in the arbitration record.

Petitioner timely filed suit in federal court alleging the defendants were liable under 42 U.S.C. §§1983, 1985 as their wrongful act was wholly outside and beyond their judiciary duties and that the state of North Carolina was also a liable party to the crime. They did not deny the charges, but pursuant to Rule 12(b)(6) the individual defendants moved for dismissal on the bases they were immune from prosecution by virtue of the "doctrine of judicial immunity" and the State moved for dismissal on the basis of "sovereign immunity". Petitioner filed an application with the District Court for a hearing in which evidence could be presented to defeat the defendants' claims made within their dismissal motion. However, District Judge Malcolm Howard denied the hearing, claiming local rules had precedence over the federal rules mandate[6] and dismissed the suit in its entirety.

Petitioner timely filed an appeal in the Fourth Circuit Court of Appeals on the basis that the District Court's granting of judicial immunity and sovereign immunity was in gross error as to fact and proper court procedure, and also that dismissal prior to the defendant's answer and without allowing the presentation of evidence as contemplated by Rule 12(d) deprived the Petitioner of any chance to present the merits to his case. That court affirmed the District Court dismissal without comment[7]. Petitioner filed for a rehearing "In

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4 The only evidence presented to corroborate the disputed conversations.
5 The fabricated evidence supporting the conversations on the tape.
6 The crux of circumstances giving rise to Petitioner's question # 3.
7 See "unpublished judgment # 95-2170" in appendix B

Banc" arguing that the federal courts have denied Plaintiff the opportunity to make ANY showing that the suit has merit which is contrary to other Fourth Circuit and this Court's decisions[8] and is fundamentally and inherently wrong. That rehearing application was denied on January 12, 1996 and Petitioner now comes to the Supreme Court seeking a mandate for the lower courts to administer justice by due process of the law and court rules.

ARGUMENT

Since the Fourth Circuit decision embraces the District Court's stipulation of facts and application of law in its entirety, without adding any discussion or reasoning of why facts in this suit justify why it is so contrary to other Fourth Circuit and Supreme Court rulings (see footnote 7), that therefore the argument will reference the District Court order of dismissal[9] instead of the Court of Appeals unpublished opinion!

QUESTION I

This question is not meant to be rhetorical [since the answer appears to be so obvious] as this Court's answer is crucial to the understanding of the lower courts' shared opinion. They have in effect answered with a resounding yes to both points; holding that the fabrication of evidence within the record under review and the criminal conspiracy to deny due process of law are in fact judicial duties! They have no problem ignoring their duties to draw a line regarding permissible judicial acts[10], they simply refuse to allow the

[8] Tahir Erk v. Glenn L. Martin Co., 116 F2d 865 (CA4, 1941), Jenkins v. McKeithen, 395 U.S. 411 (1968), Walker Process Equipment, Inc., v. Food Machinery & Chemical Co, 382 U.S. 172 (1965), United States v. New Wrinkle, Inc, 342 U.S. 371 (1951), Conley v. Gibson, 355 U.S. 41 (1957)

[9] See District Court's "ORDER" in appendix A.

[10] See Forrester v. White, 484 U.S. 219 "Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate and acts that simply happen to have been done by judges." *at* 227, and Stump v Sparkman, 435 U.S. 349 "It is only for acts performed in his judicial capacity that a judge is absolutely immune . . ." *at* 360

suit against fellow judges. If the Supreme Court denies this petition for certiorari, it will be setting precedence that judges are free to commit atrocious crimes in office as they are indeed above the law.

QUESTION 2

It has been clearly stipulated by this Court that the averments in the pleading must be taken as true when considering a 12(b) motion to dismiss an action since no opportunity to prove the allegations will have yet been afforded. This court also has maintained that a complaint should only be dismissed when it is clearly beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. However, the situation recognized here by both the district court and court of appeals is:

> "The plaintiff commenced this action, alleging that the defendants Ralph A. Walker ("Walker"), Hugh A. Wells ("Wells"), and John B. Lewis, Jr. ("Lewis") while performing their duties as Judges of the North Carolina Court of Appeals, willfully conspired to falsify the facts within the appellate record to justify ruling in favor of Folger and the Pinnacle Group. . . . The Plaintiff contends that the defendants are liable as these defendants acted outside their judicial authority and committed the criminal act of falsifying the lower court record . . . The plaintiff asserts that the defendants are accountable in this in this action as they diverged from their duties, knowingly changed the appellate record, returned back to their official duties and rendered an opinion that was consistent with the altered record.[2] . . . The court finds that the defendant justices are not liable for any judgment rendered in The Pinnacle Group, Inc. v. Shrader . . . as the decision was performed pursuant to their judicial duties."
>
> ---
>
> "[2] Even if the court were to determine that the judges' actions were not within their judicial duties, . . . evidence of a pre hearing affidavit . . . may constitute the 'other documentary evidence' discussed by the defendant judges within their order." [See "ORDER" in Appendix A]

Consequently it should be clear to this court that the genuine contention recognized by the District Court is the act of deliberately falsifying the arbitration record which must be granted as a true fact for purposes of deciding the dismissal motion, and which is inherently and wholly non-judicial and clearly defeats the defense of 'judicial immunity'. But rather than holding the requested Rule 12(d) hearing to resolve whether the evidence would prove or disprove the defendants' claims, Judge Howard aggravates the situation by his footnote comment that even if he accepted that the act of falsifying the record as non-judicial, he **openly speculates** the single arbitration pre-hearing affidavit may be the referenced documentary evidence, [presented by both sides no less] implying that there is no fabricated evidence and thus no non-judicial conduct.

This egregious behavior of dismissing the suit after improperly blocking the plaintiff from presenting evidence and then speculating how the defendants might answer the allegations is obviously Judge Howard's way to quash exposing the judicial corruption of the defendants that the presentation of the actual evidence at either the hearing or the trial on the merits would cause to happen. Is Judge Howard as corrupt as Walker, Wells and Lewis? Is the Court of Appeals similarly attempting to stifle and conceal the corruption by avoiding any discussion on the merits and simply issuing an unpublished opinion?

QUESTION 3

Rule 1.0 of the Local Rules of Practice and Procedure in the Eastern District of North Carolina stipulates:

> "These local rules of practice shall govern the conduct of the United States District Court for the Eastern District of North Carolina except when the conduct of this court is governed by federal statutes and rules."

And Rule 12(d) of the Federal Rules of Civil Procedure stipulates:

> "(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

Surely this court can see that the District Court was severely out of line to stipulate in its order that local rule 4.09 grants it discretion to deny a F.R.Civ.P. Rule 12(d) hearing (See appendix A) that is mandated by the federal rules; and that the Court of Appeals should have definitely corrected that very obvious shortcoming. Again the apparent intent of both lower courts is to hush and stifle the suit before the presentation of evidence and publicity could explicitly expose the defendants' crime and judicial corruption.

QUESTIONS 4,5,6,7

This court has long maintained that the term "person" used in 42 U.S.C. §1983 does not include the State, but it has also long maintained that a suit against "the person" as a state official is indeed a suit against the State, See Kentucky v. Graham, 473 U.S. 159.

> "Personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. . . . Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' . . . On the merits, to established personal liability in a §1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. . . . More is required in an official-capacity action, however, for a governmental entity is liable under §1983 only when the entity itself is a 'moving force' behind the deprivation. . . . thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." @ 165 (Citations omitted)

Consequently, as the individual defendants may have been performing according to the State of North Carolina's policy and custom when they planted evidence in the arbitration record, and thus denied Petitioner's Constitutional right to due process of law, the State is properly joined as a defendant. If this is true, then there are so many others [clerks, assistants, etc.] involved in the conspiracy that "The State" becomes the "person" for purposes of §1983. Petitioner contends the state must answer the lawsuit complaint affirmatively to the effect that the wrong committed was not condoned by the State [in its memorandum in support of the dismissal motion the State claims the defendant judges actions were indeed 'official' state actions] in order to be dismissed as a defendant.

North Carolina's sovereign immunity from an individual's suit for damages was explicitly waived by its ratification of the Fourteenth Amendment in which Section 5 supersedes provisions of the Eleventh Amendment. The granting of power to enforce the amendment provisions inherently removes sovereign immunity as a defense to any such statute that may, even slightly, attach to a state. Also, North Carolina's own Constitution waives sovereign immunity by its stipulation that "every person for an injury done him . . . shall have remedy by due course of law;[11] and right and justice shall be administered without favor, denial, or delay." (footnote and emphasis added)[12] along with this Court's opinion that the entity is liable under §1983 when the policy or custom is responsible for the deprivation of Constitutional rights, [see above] it should therefore remain a party to this suit.

CONCLUSION

The allegation in the complaint is that North Carolina State appellate judges fabricated evidence and falsified the record under their review for the purpose of ruling against the appellant[13] That act is inherently

11 42 U.S.C. §§ 1983, 1985

12 Article I, Section 18 [See constitutional provisions - page vi]

13 See Pinnacle v. Shrader, 105 N.C. App. 168 (1992) in appendix D

'non-judicial' and therefore defeats a dismissal motion on 'judicial immunity' grounds. The improper procedure and rulings of both the District Court and the Court of Appeals, while egregiously blocking the proper course of justice, cannot change this fact.

Inclusion of the State of North Carolina in the suit is mandated by its claim that the defendant judges were acting in their official capacity when they performed the criminal act of falsifying the record under review, as this court has held a political entity liable under §1983 when the act is performed pursuant to the entity's custom or policy, and the state has waived its sovereign immunity by virtue of both section 5 of the Fourteenth Amendment and Article I, Section 18, of the state's own constitution. Petitioner maintains that the State must remain a defendant in this action unless and until it is determined on the merits that the wrongful act was actually performed by the judges in their personal capacity.

Petitioner prays this court will grant the writ of certiorari in this matter as the lower courts' conduct is so egregiously improper[14] and unjust. Petitioner also prays this court will reverse the lower court's judgments and take appropriate action to mandate to the lower courts that adherence to the rules and principles of justice must prevail above all else.

Submitted this 5th day of April, 1996

By James E. Shrader

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(919) 848-6663

[14] Supreme Court Rules 10(a), 10(c)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:95-CV-34-H-1

JAMES E. SHRADER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
THE STATE OF NORTH CAROLINA, RALPH A. WALKER; HUGH A. WELLS; JOHN B. LEWIS, JR.; and JOHN DOE,	)	
	)	
Defendants.	)	

This matter comes before the court on the defendants' motion filed March 28, 1985, to dismiss this action pursuant to Rule 12 of the federal Rules of Civil Procedure. The plaintiff filed his response on April 18, 1995, and motioned for a hearing on the motion to dismiss. The defendants did not file a response to the plaintiff's motion for a hearing. This matter is ready for adjudication.

Statement of the Facts

The pro se plaintiff commenced this action on January 19, 1995, seeking restitution from the defendants in addition to punitive and exemplary damages in the amount of ten million dollars. The plaintiff alleges that the defendants breached his rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1985.

The plaintiff commenced a previous action against The Pinnacle Group, a brokerage firm, and their stock broker agent Lee A. Folger ("Folger"), alleging they conducted unauthorized trading which resulted in a large financial loss to the plaintiff. The previous action was first presented to the National Association of Securities Dealers to conduct an arbitration between the parties. During the course of the arbitration, The Pinnacle Group and Folger presented tape recordings that allegedly contained the plaintiff verbally ordering the trades the plaintiff contends were unauthorized.

The plaintiff objected to the arbitrators' evidentiary rulings permitting the admission of the tapes recordings. The plaintiff contends that Folger and The Pinnacle Group forged the tape to include his authorization. The plaintiff maintains that the tape was never authenticated by anyone. The plaintiff further complains that he was denied access to the original tape recordings, which could be utilized by an expert to determine if forgery had occurred.

The plaintiff appealed the evidentiary rulings to the Mecklenburg County Superior Court and the North Carolina Court of Appeals, seeking to vacate the arbitrators' judgment. The plaintiff commenced this action, alleging that the defendants Ralph A. Walker ("Walker"), Hugh A. Wells ("Wells"), and John B. Lewis, Jr. ("Lewis"), while performing their duties as Judges of the North Carolina Court of Appeals, willfully conspired to falsify the facts within the appellate record to justify their ruling in favor of Folger and The Pinnacle Group

Discussion

I. Plaintiff's Motion for a Hearing on the Defendant's Motion to Dismiss.

The plaintiff motioned for a hearing on the defendants' motion to dismiss on April 18, 1995, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure. Rule 12(d) provides that many defenses set forth by a defendant pursuant to Rule 12(b) must be heard before trial. A hearing on a motion to dismiss is not mandatory. A Motion

for a hearing on any motion may be conducted at the discretion of the court. See, Local Rule 4.09 ("Hearings on motions may be ordered by the court in its discretion. Unless so ordered, motions shall be determined without a hearing.") The plaintiff's blanket request did not illustrate any particular benefit a hearing on the matter would provide the parties. Accordingly the court hereby DENIES the plaintiff's motion for a hearing on defendants' motion to dismiss.

II. Motion to Dismiss

The defendants, the State of North Carolina ("North Carolina'), Walker, Wells, and Lewis, contend that the plaintiff's complaint should be dismissed as (1) this court lacks subject matter jurisdiction; (2) Eleventh Amendment immunity bars recovery from North Carolina; (3) several defendants are protected from civil liability by their absolute immunity; (4) the plaintiff has failed to state a claim upon which relief can be granted; and (5) the doctrine of issue preclusion and collateral estoppel bars all recovery. The Court shall consider the defendants' arguments based upon absolute immunity and the Eleventh Amendment as they may be dispositive of the entire matter.

A. The judiciary May Not Be Held Liable For Any Actions Taken Within Their Jurisdiction.

The defendants Walker, Wells, and Lewis[1] contend that they are absolutely immune from any personal liability for damages which allegedly resulted to the plaintiff. The plaintiff contends that the defendants are liable as these defendants "acted outside their judicial authority and committed the criminal act of falsifying the lower court record . . . " See Plaintiff's Memorandum in Opposition to the defendants Motion to Dismiss, p. 7. In essence the plaintiff contends

[1] The court includes the defendant John Doe within its discussion of judicial immunity. The defendant John Doe is an unnamed defendant which represents unknown law clerks and other staff members of the North Carolina Court of Appeals who, under the direction of the defendant judges, conducted various actions in this action.

that the defendant judges stipulated within their order that the record contained the copied tapes, testimony presented form witnesses during the arbitration and other documentary evidence. The plaintiff insists that no documentary evidence was utilized to illustrate the contents of the tapes. The plaintiff argues that the defendant judges willfully modified the record through this one statement within the opinion for the sole purpose to rule against him.

Judicial officers, including the defendant judges sitting on the North Carolina Court of Appeals, are absolutely immune from liability under 42 U.S.C. § 1983 for judgments rendered within their "judicial jurisdiction." Pierson v. Ray, 386 U.S. 547, 554 (1967); Stump v. Sparkman, 435 U.S. 349, reh'g denied, 486 U.S. 951 (1978). An action of a judge is judicial in nature, triggering absolute immunity, where it is a "function normally performed by a judge." Stump 435 U.S. at 362.

The plaintiff asserts that the defendants are accountable in this action as they diverged from their duties, knowingly changed the appellate record, returned back to their official duties and rendered an opinion that was consistent with the altered record[2]. However, judicial immunity "shields judges even against allegations of "malice or corruption" such as these asserted by the plaintiff. McCray v state of Maryland, 456 F.2d 1, 3 (4th Cir. 1972). It allows the judicial community to exercise wide discretion in performing their duties without fear of reprisal. Id.

The defendant judges' review of the record and determination of the form of evidence presented by the parties is within their jurisdiction and constitutes a judicial duty. The court finds that the defendant justices are not liable for any judgment rendered in The Pinnacle Group v. Shrader, 105 N.C. App. 168, 412 S.E. 2d 117

[2] Even if the court were to determine that the defendant judges' actions were not within their judicial duties, it is noted that the evidence suggests that an affidavit by Folger was made prior to trial. The plaintiff stipulated that Folger's oral testimony at the arbitration was counter to his pre-hearing affidavit. Such evidence of a pre-hearing affidavit, as part of the record for appeal, may constitute the "other documentary evidence" discussed by the defendant judges within their order.

(1992), as the decision was performed pursuant to their judicial duties.

B. The State Of North Carolina Is Exempt From All Civil Damages Claims Pursuant To The Eleventh Amendment.

The plaintiff's action seeks monetary compensation from the defendants jointly and severally, in the amount of ten million dollars. The Eleventh Amendment of the Constitution of the United States bars all suits for money damages against a state in a federal district court. Edelman v. Jordan 415 U.S. 651, reh'g denied, 416 U.S. 1000 (1974); Pardon v. Terminal Railway of the Alabama State Dock Dept., et al., 377 U.S. 184 (1964); see also Bright v. McClure, 865 F.2d 623 (1989). A consenting State may waive the immunity preserved by the Eleventh Amendment. Pardon, 377 U.S. 184.

In a novel legal argument, the plaintiff contends that North Carolina's ratification of the Fourteenth Amendment of the United States Constitution somehow constitutes a waiver of North Carolina's Eleventh Amendment immunity. However, a state "has an Eleventh Amendment immunity from an action for damages, for the congress has made no move to impose §1983 liability upon states, and North Carolina has made no move to waive its immunity." Bright v. McClure 865 F.2d at 625. The plaintiff is not entitled to any recovery for damages in federal court from the State of North Carolina.

Conclusion

Accordingly, the court hereby DENIES the Plaintiff's motion for a hearing on the defendants' motion to dismiss. The court GRANTS the defendants' motion to dismiss. The clerk of this court is directed to close this case.

This the 10th day of May, 1995.

/s/ _____
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#15

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2170

JAMES E. SHRADER,

Plaintiff - Appellant,

verses

NORTH CAROLINA; RALPH A. WALKER;
HUGH A. WELLS; JOHN B. LEWIS, JR.;
JOHN DOE,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge. (CA 5:95-34-5-CIV-H)

Submitted: November 16, 1995 Decided: November 27, 1995

Before MICHAEL and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge

Affirmed by unpublished per curiam opinion.

James E. Shrader, Appellant Pro Se. Jacob Leonard Safron, Special Deputy Attorney general, Raleigh North Carolina, for Appellees

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

PER CURIAM:

Appellant appeals from the district court's order denying relief in his civil rights action. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly we affirm on the reasoning of the district court. Shrader v. North Carolina, No. CA-95-34-5-CIV-H (E.D.N.C. May 10, 1995). We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 12, 1996

JAMES E. SHRADER
Plaintiff - Appellant

v.

STATE OF NORTH CAROLINA;
RALPH A. WALKER;
HUGH A. WELLS;
JOHN B. LEWIS, Jr.;
JOHN DOE,
Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this court. As no member of this court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Bert M. Montague
CLERK

PINNACLE GROUP, INC. v. SHRADER
[105 N.C. APP. 168 (1992)]

"**1. Arbitration and award § 30 (NCI4th) - refusal of arbitrators to compel production of tapes - testimony heard - no basis for overturning award.**

Arbitrators did not engaged in misconduct so egregious as to deny respondents a fair hearing on their claim of unauthorized trading on their securities account, though the arbitrators refused to compel the production of original audio tapes of conversations between plaintiff's broker and respondent for expert analysis and the parties disagreed about the content of those conversations, since, in addition to the tapes both sides presented oral and documentary evidence about the conversations and trades in question, and, while a complete omission of critical evidence by the arbitrator would justify vacating the result, the award should not be overturned if the evidence in question was heard in one form or another."

"WALKER, judge.

Respondents bring forth three question for this courts review. First they contend the arbitrators committed error when they (1) failed to compel production of certain audio tapes for expert analysis;

. . .

[1] Respondents' first assignment of error is the arbitrators refusal to compel the production of certain audio tapes of the October 1987 conversations between Shrader and Folger for expert analysis. They contend that expert analysis of the original tapes would have disclosed the original tapes had been tampered with. In December 1989, respondents requested voluntary production of the tapes so that an expert could analyze them. Pinnacle provided a copy of a composite tape allegedly made from the original taped conversations which were on different tapes. Thereafter, respondents requested an order compelling production of the original tapes at the office of their expert. Pinnacle objected . . .

The arbitrator specifically selected to consider the matter denied respondents' request by order dated 2 March 1990, and instead, required Pinnacle and Folger to produce affidavits establishing the chain of custody of the tapes by a person authorized to verify that the tapes had not been altered or tampered with. The order further provided that Pinnacle and Folger 'should stand ready to produce immediately the originals of the tapes at the hearing conducted in this matter. Such order may be induced if further evidence is supplied that indicates tampering of the tapes has taken place. These affidavits were submitted by pinnacle's attorney and Folger. Respondents renewed their request for production of the tapes at the hearing on the matter. The arbitrators again denied the request, but gave respondents leave to present additional evidence.

. . .

In the case before us, the record reveals that in addition to the tapes, both sides presented oral and documentary evidence about the conversations and trades that were the basis for respondents' claim of unauthorized trading. This dispute centers around the conflicting versions of the conversations between Shrader and Folger. Both parties to the disputed conversations testified about their recollection of the conversations. Some of the conversations were taped, others were not. Mr. Shrader testified extensively as to what he contended was inaccurate about the tape transcripts. While a complete omission of critical evidence by the arbitrator would justify vacating the result, the award should not be overturned if the evidence was heard in one form or another. . . . Having heard the testimony and evidence on the substance of what was contained in the tapes, we cannot say as a matter of law that the arbitrators engaged in misconduct so egregious as to deny respondents a fair hearing. . . . [citations omitted and emphasis added]